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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of KEITH and  
JENNIFER G. THESING.

H034272  
(Santa Clara County  
Super. Ct. No. FL112646)

KEITH A. THESING,

Appellant,

v.

JENNIFER G. THESING,

Respondent.

This appeal arises out of a marital dissolution action between Keith Thesing (Husband) and Jennifer Thesing (Wife). In this appeal, Husband challenges a June 2009 order that set permanent spousal support at \$1,500 per month and awarded Wife \$15,000 in attorney fees. He also attacks a March 2007 order awarding Wife \$75,000 in attorney fees as a sanction pursuant to Family Code section 271.<sup>1</sup>

We conclude that the March 2007 attorney fees order is not appealable because Husband's appeal from that order is not timely and because Husband failed to specify that order in his notice of appeal.

<sup>1</sup> All further statutory references are to the Family Code, unless otherwise stated.

With regard to the June 2009 spousal support/attorney fees order, Husband challenges the sufficiency of the evidence to support the amount of the fee order and the court's finding that Husband had the ability to pay attorney fees. Husband challenges the spousal support order on several grounds, arguing that the court failed to consider the factors in section 4320, including his ability to pay spousal support and the marital standard of living. He argues that the court erred when it failed to impute income to Wife. He further maintains that the court's orders were motivated by judicial bias. As we will explain, Husband has failed to provide us with an adequate record to permit review of some of his claims. To the extent that his claims are reviewable on the record provided, we find no error and will therefore affirm the June 2009 spousal support/attorney fees order.

## **FACTUAL AND PROCEDURAL HISTORY**

### ***Petition and Initial Court Orders***

Husband and Wife were married in February 1992. Husband filed a petition for dissolution of the marriage in March 2003. The parties have two children, who were born in 1996 and 1998, and were five and seven years old when Husband filed for dissolution.

At a hearing in August 2003, the court found that Husband's gross monthly income was \$10,834 and that Wife had no income. Husband worked in the "start-up software business" and occasionally earned bonuses. The court found that the children spent 85 percent of their time with Wife and 15 percent of their time with Husband and ordered Husband to pay \$2,808 per month in child support and \$1,860 per month in temporary spousal support beginning September 1, 2003. The court also ordered the

payment of a *Smith-Ostler*<sup>2</sup> percentage for any amounts Husband earned over \$10,834 per month.

At a hearing in January 2005, the court modified child support and temporary spousal support, and found that Husband's gross income was \$11,050 per month, that Wife's gross income was \$373 per month, and that the children spent 66 percent of their time with Wife and 34 percent of their time with Husband. The court ordered Husband to pay child support of \$2,246 per month and temporary spousal support of \$1,519 per month retroactive to December 1, 2004.

Husband subsequently petitioned for a modification of support on the ground that he had lost his job. In March 2005, the court reduced his child support obligation to \$308 per month and reduced temporary spousal support to zero.

A vocational evaluation done in 2005<sup>3</sup> indicates that Wife was working part-time for her children's school (20 hours per week as an attendance clerk; 10 hours per week doing yard duty) with a total income of approximately \$300 per week. Wife has a high school diploma, but no college education. She last worked "in industry" in 1996, prior to the birth of her first child. At that time, she earned \$56,000 per year working as a system analyst. The vocational evaluator concluded that Wife no longer has the skills to work as a system analyst and that her current path would not allow her to become self-supporting.

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<sup>2</sup> The term "*Smith-Ostler*" refers to *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33. In that case, the appellate court affirmed the trial court's "order for additional support, based on a percentage of [husband's] future bonuses." (*Id.* at p. 37.) It held that the then-governing statute allowed the trial court to "consider the future bonuses of a parent in determining income for purposes of fixing child support." (*Id.* at p. 52.) That case was decided under a predecessor statute, the Agnos Act (*id.* at p. 51; see Civ. Code, former § 4720 et seq.) that provided for mandatory minimum child support, with trial court discretion to order additional support (*id.* at pp. 51-52, citing Civ. Code, former § 4724).

<sup>3</sup> As we discuss ante, it is not clear from the record whether this report, which is in Husband's Appendix, was filed in the trial court. We include this brief summary as background information only.

At a settlement conference in May 2005, the parties stipulated to a date of separation of March 1, 2003, which means the marriage lasted 11 years. The parties also stipulated to the division of certain financial obligations and personal property and agreed that an employment efforts order would issue for both parties. The remaining property issues were disposed of by trial.

The marriage was dissolved by a status-only judgment filed in March 2006. Husband's support obligation was modified in May 2006 and he was ordered to pay \$1,713 per month in child support and \$1,303 per month in temporary spousal support.

### ***March 2007 Attorney Fees Order***

In January 2007, the court conducted a hearing on a motion filed by Wife in October 2006. The record on appeal does not contain Wife's moving papers, any papers filed in opposition to the motion, a complete transcript of the hearing,<sup>4</sup> or the evidence presented at the hearing.

At the hearing, the court found that Husband had (1) "breached his fiduciary duties to [Wife]"; (2) "misled the court on numerous occasions"; and (3) "perjured himself on numerous occasions." The court found that Husband's conduct "warrants an award of sanctions pursuant to . . . section 271" and ordered Husband to pay Wife's attorney "\$75,000 in full on or before March 15, 2007." The court also ordered the parties "to exchange W-2 forms before February 28th of every year and copies of filed tax returns before April 30th of every year." It appears the court's order was based on Husband's failure to disclose income and employment from as far back as March 2005. The court's formal written order on its January 3, 2007 ruling was entered on March 14, 2007.

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<sup>4</sup> Husband's appendix contains the last 3 pages of the 73-page transcript of the January 3, 2007 hearing. Wife's counsel read a portion of that transcript into the record at the April 13, 2009 hearing on permanent spousal support.

### ***Subsequent Proceedings***

On May 14, 2007, Husband filed a motion to modify child support, set permanent spousal support, and determine support arrearages. A copy of that motion is not in the record.

In July 2007, Wife filed a declaration in response to the motion and an income and expense declaration. Wife continued to work for the school district. She also did part-time work for her attorney. In her declaration, she asked for an award of attorney fees pursuant to sections 2030 and 271.

In September 2007, Wife filed an order to show cause re contempt, which was resolved by stipulation in April 2008. Neither the order to show cause nor the stipulation is in the record on appeal.

In a declaration filed in June 2008, Husband alleged that Wife was “not taking the Employment Efforts Orders seriously” and argued that “[s]he simply does not want to work. She is capable of working full time and has chosen not to do so.”

In October 2008, the court modified Husband’s support obligation again. The court found that Husband earned \$11,250 per month and that Wife earned \$1,733 per month. The court ordered Husband to pay \$1,819 per month in child support retroactive to January 1, 2008. The court found that Husband was \$6,611 in arrears in child support and \$45,935.05 in arrears in spousal support through December 31, 2007. The court did not make any other orders regarding spousal support and issued a seek work order to both parties.

In December 2008, Husband’s support obligation was modified and he was ordered to pay \$1,853 per month in child support beginning November 1, 2008. The court did not make any orders regarding spousal support. The court “estimated” that Husband was \$62,235 in arrears in child support as of November 2008 and ordered payments of \$247 per month toward the arrearage.

### ***Long-Cause Hearing and June 2009 Spousal Support & Attorney Fees Order***

In April 2009, the court held a three-day, long-cause hearing on Husband's motion to modify child support, to set permanent spousal support, and to determine support arrearages. At that time, Husband also asked the court to review the March 2007 attorney fees order.

In her April 2009 income and expense declaration, Wife declared that she earned \$1,200 per month and had expenses of \$4,670 per month. She declared that she had paid \$134,591.79 in attorney fees and costs and still owed her attorney \$17,979.98. She used credit cards and the proceeds from the sale of the house she owned with Husband to pay her attorney. She was renting her residence.

In his April 2009 income and expense declaration, Husband declared that he had been working as an account manager for Compuware Corporation since October 31, 2008, with income of \$10,000 per month. He also earned \$6,700 the previous month doing contract work. He owned a home, which he purchased in 2005, and had \$150,000 in assets. He claimed expenses of \$18,799 per month. Husband did not declare any child care expenses and Wife argued that it was because she provided the child care.

The record does not contain a reporter's transcript of the first two days of the hearing or the evidence presented at the hearing. We do have a reporter's transcript for the third day of the hearing, in which the parties presented their arguments and the court stated its ruling. We briefly describe the parties' arguments as they indicate what the issues were at the hearing.

In argument, Husband's attorney urged the court to terminate temporary spousal support as of May 2007 and to set permanent spousal support at \$300 per month to give Wife an incentive to seek full-time work. He argued that if the court imposed a higher amount, Husband would not be able to make his house payment or meet his other expenses. Counsel acknowledged that Husband had made a mistake when he failed to

disclose his income, but asserted that the court also made a mistake when it imposed an attorney fees order that Husband has no ability to pay. Counsel stated that Husband had not paid anything on the previous fee award. He argued that Wife's attorney fees were "obscene" and could not be justified.

Wife's attorney provided the court with a copy of the transcript of the January 3, 2007 hearing and stated that Husband had actively concealed his employment and perjured himself regarding his income for a "period greater than one year." Counsel explained that Wife's attorney fees were so high because he had to (1) conduct discovery after Husband refused to comply with the court's orders, (2) file contempt charges against Husband, and (3) go to trial three times – regarding the division of assets, the breach of fiduciary duty claim, and permanent spousal support. Wife's counsel argued that the court should not rely on Husband's income declaration of \$10,000 per month based on Husband's W-2 forms for 2008 and his most recent employment application in which he stated that he had earned in excess of \$265,000 per year from his three prior employers.<sup>5</sup> Counsel argued that, in addition to Husband's \$10,000 per month base salary, Husband would earn commissions and a \$6,250 bonus every quarter and suggested the court set permanent spousal support at \$3,257.50 per month beginning January 2008.

The court found that the marriage was a "long-term marriage" of 11 years duration. The court found that "[n]either party has the capacity to meet the marital standard of living" and that the "parties' combined income does not support the marital standard of living." The court found that Wife "does not have significant marketable skills and will likely never have the earning capacity similar to [Husband]." The court found that Wife did not support Husband in his education, training or career within the

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<sup>5</sup> According to counsel's argument, Husband's employment application claimed income of \$265,000 per year, \$410,000 per year, and \$455,000 per year from his three prior employers. Wife's counsel acknowledged that the numbers on the employment application may have been exaggerated.

meaning of section 4320, subdivision (b). It concluded that Husband earns a base salary of \$10,000 per month, is eligible for commissions and bonuses, and has expenses of \$19,000 per month. The court found that neither party has separate property assets of significance, but that Husband owns a home. The court found that Wife was “underemployed,” was unable to “hold down” full-time employment, and had an obligation to become self-supporting. The court found that both parties were healthy and that domestic violence was not an issue. The court ordered Husband to pay Wife \$1,500 per month in permanent spousal support, plus a *Smith-Ostler* percentage of any earnings between \$10,000 and \$12,800 per month, beginning January 1, 2008. The *Smith-Ostler* calculation was to be done every three months. The court ordered the parties to return on April 15, 2010, to review the matter.

The court also ordered Husband to pay Wife attorney fees of \$15,000<sup>6</sup> and stated that if the attorney fees were paid within 45 days, they would constitute a credit against the previous \$75,000 attorney fees award. If the fees were not paid on time, there would be no credit.

Husband filed his notice of appeal on May 22, 2009. In August 2009, Husband filed a petition for a writ of supersedeas in this court, requesting a stay of both the March 2007 attorney fees order and the June 2009 spousal support/attorney fees order. Both the petition and the stay request were summarily denied. (*In re Marriage of Thesing* (Aug. 14, 2009, H034272).)

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<sup>6</sup> It is not clear from the record whether this was a needs-based award (§ 2030) or a sanction (§ 271). The trial court did not characterize the \$15,000 award as a sanction when it imposed the award.

## DISCUSSION

### *I. Timeliness of Appeal*

Husband challenges two orders on appeal: (1) the court's order of March 14, 2007, imposing an attorney fees sanction of \$75,000 pursuant to section 271 (hereafter "March 2007 attorney fees order") and (2) the court's order of June 5, 2009 setting permanent spousal support at \$1,500 per month and ordering attorney fees of \$15,000 (hereafter sometimes "June 2009 spousal support/attorney fees order").

Wife challenges the timeliness of the appeal with regard to the March 2007 attorney fees order and hence the appealability of that order. Although Wife has not challenged the timeliness of the June 2009 spousal support/attorney fee order, we note that there are problems with the timing of the appeal from that order. "[S]ince the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion." (*Olson v. Cory* (1983) 35 Cal.3d 390, 398; *van 't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 559.)

We shall address each order separately since different rules apply to each order.

#### **A. Appeal from March 2007 Attorney Fee Order**

A court may impose attorney fee sanctions pursuant to section 271 at any time during the litigation. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1494-1495.) An order awarding attorney fees under section 271 is an appealable order. (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82; *In re Marriage of Freeman* (2005) 132 Cal.App.4th 1, 4.)

There are two insurmountable problems with Husband's purported appeal from the March 2007 attorney fees order. First, the appeal from that order was not timely. Second, the March 2007 attorney fees order is not specified in Husband's notice of appeal.

### ***1. Timeliness of Appeal***

The time for filing an appeal is jurisdictional; “once the deadline expires, the appellate court has no power to entertain the appeal.” (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) The time for filing an appeal is governed by California Rules of Court, rules 8.104 and 8.108.<sup>7</sup>

Rule 8.104(a) states, in relevant part: “[A] notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, . . . ; (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment . . . ; or (3) 180 days after entry of judgment.” The word “judgment” in rule 8.104(a) “includes an appealable order if the appeal is from an appealable order.” (Rule 8.104(f).)

The March 2007 attorney fees order was entered on March 14, 2007, the date it was filed in the trial court. (Rule 8.104(d)(1).) The record on appeal does not indicate whether the superior court clerk or a party ever served a “Notice of Entry” of order or a file-stamped copy of the March 2007 attorney fees order, which would trigger one of the 60-day deadlines for filing a notice of appeal under rule 8.104.<sup>8</sup> Since the record does not contain evidence of service of a notice of entry of the order or of the order itself, the 180-

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<sup>7</sup> All further rules references are to the California Rules of Court.

<sup>8</sup> The court conducted the hearing at which it orally announced its intention to impose the sanction on January 3, 2007. Wife’s attorney prepared a proposed written order and served it on Husband on February 21, 2007. The court signed the order on March 11, 2007, and filed it on March 14, 2007. There is no notice of entry or proof of service of the endorsed-filed order in the record. Wife obtained an abstract of judgment summarizing the attorney fee order on May 29, 2007, and filed the abstract with the county recorder on June 4, 2007, but the record does not contain a notice of entry or proof of service of the abstract, either.

day deadline in rule 8.104 applies; 180 days after entry of the March 14, 2007 order was September 10, 2007. Husband's notice of appeal, which was filed on May 22, 2009, was therefore untimely.

Husband contends that his appeal from the March 2007 attorney fees order is timely because the court's June 2009 attorney fees order modified the March 2007 attorney fees order by allowing for a credit against the March 2007 award if the \$15,000 attorney fees award was paid within 45 days.

An exception to the time limits set forth in rule 8.104(a) applies in cases where a party files a motion for new trial, a motion to vacate a judgment, or a motion to reconsider an appealed order. (Rule 8.108(b), (c), (e).) With regard to motions to reconsider an appealable order, rule 8.108(e) provides: "If any party serves and files a valid motion to reconsider an appealable order under Code of Civil procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first motion to reconsider is filed; or [¶] (3) 180 days after entry of the appealable order." Rule 8.108's provisions relating to motions for new trial and motions to vacate a judgment contain similar provisions providing that the time to appeal is extended to the earliest of certain specified dates, but in no event is the time extended more than "180 days after entry of judgment." (Rule 8.108(b)(1)(C), (c)(3).)

Husband filed a motion to modify child support, set permanent spousal support, and determine support arrearages on May 14, 2007. However, a copy of that motion is not in the record. According to Husband's amended papers filed in June 2008, the motion asked the court to review the March 2007 attorney fees order. Since the record does not contain a copy of the motion, we do not know whether it contained a valid motion to reconsider pursuant to Code of Civil Procedure section 1008, which is required to obtain the extension under rule 8.108(e). Even if it did, the rule 8.108 extension of

time to file an appeal does not extend beyond “180 days after entry of the appealable order.” (Rule 8.108(e)(3).) As stated before, 180 days after entry of the March 2007 attorney fees order was September 10, 2007. Thus, even if the rule 8.108(e) extension applied, Husband’s appeal, filed on May 22, 2009, was untimely.

Moreover, the court’s June 2009 order did not modify the March 2007 attorney fees order. At the hearing, the court stated that it was “not going to do anything about” the \$75,000 attorney fees order and left that order intact. The court ordered the payment of an additional \$15,000 in attorney fees and told Husband that if he paid that amount within 45 days, it would be considered a credit against the previous \$75,000 attorney fees order, “effectively” reducing the amount due on that award to \$60,000. However if the fees were not paid within 45 days, the credit would not apply.

## ***2. Failure to Specify March 2007 Order in Notice of Appeal***

Where several judgments or orders are separately appealable, each appealable judgment or order must be expressly specified, in a single notice of appeal or multiple notices of appeal, to be reviewable on appeal. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.) Since an order awarding attorney fees under section 271 is an appealable order (*In re Marriage of Burgard, supra*, 72 Cal.App.4th at p. 82; *In re Marriage of Freeman, supra*, 132 Cal.App.4th at p. 4), Husband was required to specify the March 2007 attorney fees order in his notice of appeal. Since Husband’s notice of appeal does not state that he is appealing from that order, it is not reviewable on appeal. And even if Husband had specified the March 2007 order in his notice of appeal, the appeal from that order would still be untimely.

For these reasons, we conclude that we are without jurisdiction to consider Husband’s appeal of the March 2007 attorney fees order and must dismiss that portion of the appeal.

## **B. Appeal from June 2009 Spousal Support/Attorney Fee Order**

Husband purports to appeal from “the judgment entered in the record on April 13, 2009.” No appealable judgment or order was entered that day. (See Rule 8.104(d) [explaining what constitutes *entry* of a judgment or order].) April 13, 2009 was the third day of the hearing on permanent spousal support, attorney fees, and costs. That day, the court orally announced its decision awarding Wife permanent spousal support plus attorney fees and made other findings and orders. Counsel for Wife prepared the written order. The written order was entered on June 5, 2009, the date the court signed and filed it. (Rule 8.104(d)(1).)

Husband filed his notice of appeal on May 22, 2009, after the April 13, 2009 hearing where the trial court orally announced its decision, but before June 5, 2009, the date the court entered its written order. Husband’s notice of appeal was therefore premature.

Although Husband’s notice of appeal is premature, we have discretion to treat it as “as filed immediately after entry of” the order, which would be timely. (Rule 8.104(e)(2).)<sup>9</sup> In exercising our discretion, we liberally construe Husband’s premature notice of appeal in favor of its sufficiency. (*Marcotte v. Municipal Court* (1976) 64 Cal.App.3d 235, 239.) It is reasonably clear from the notice of appeal that Husband intended to challenge the court’s ruling of April 13, 2009, and it does not appear that Wife was misled or prejudiced by Husband’s reference to the court’s April 13, 2009 oral pronouncement instead of the written order entered on June 5, 2009. We will therefore treat Husband’s premature notice of appeal as being filed immediately after the written order that was entered on June 5, 2009. (Rule 8.104(e)(2).)

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<sup>9</sup> Rule 8.104(e)(2) provides: “The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.” For the purpose of this rule, a “judgment” includes an appealable order. (Rule 8.104(f).)

In summary, the portion of Husband's appeal that challenges the March 2007 attorney fees order must be dismissed, because the appeal of that order is untimely and was not specified in the notice of appeal. The portion of the appeal that challenges the June 2009 spousal support/attorney fees order is timely and will not be dismissed.

## ***II. Deficiencies in the Record on Appeal***

The record on appeal consists of a reporter's transcript of the April 13, 2009 hearing, an appellant's appendix (hereafter Husband's Appendix) and a respondent's appendix (hereafter Wife's Appendix). Before we address the merits of the appeal, we will discuss deficiencies in the parties' appendices.

The clerk of the court was required to send the parties a copy of the register of actions (rule 8.124(a)(2)) and the parties were required to include copies of the register of actions in their respective appendices (rules 8.124(b)(1)(A); 8.122(b)(1)(F)). "This provision is intended to assist the reviewing court in determining the accuracy of the appendix." (Advisory Com. Com, 23 pt. 2 West's Ann. Codes, Court Rules (2006 ed.) foll. Rule 8.124, p. 551.) Neither party has complied with this requirement.

The form of the appendix must comply with the requirements for a clerk's transcript set forth in rule 8.144(a)-(c). (Rule 8.124(d)(1).) This includes the requirements that the contents of the appendix be arranged in chronological order (rule 8.144(a)(1)(C)) and that the appendix include chronological and alphabetical indices (rule 8.144(b)). These formatting requirements assist the court in reviewing the record expeditiously and allow the justices and their staff to find material in the record. In this case, Wife's Appendix is not arranged in chronological order. It has only one index that is not arranged in either chronological or alphabetical order. Husband's Appendix is arranged in chronological order, with a few items that appear to be out of order. It does not contain an alphabetical index.

An appendix may only contain accurate copies of documents filed in the superior court. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 592, fn. 11.) By filing an appendix, counsel or a self-represented party represents to the court that the appendix “consists of accurate copies of documents in the superior court file.” (Rule 8.124(g).) It appears both parties have included material in their appendices that may not have been filed with the superior court,<sup>10</sup> although it is difficult to know for sure. (See e.g., Husband’s Appendix, pp. 45-46, 53-56, and Wife’s Appendix, pp. 57-62, 18-19, 32-33, 46, and 63-79.) The appellant’s election to proceed by appendix does not authorize the parties to cherry-pick documents from their respective files for use in the appellate court without considering whether those documents were before the trial court.

Wife’s Appendix also contains material that was filed after the order appealed from in this case. An appendix must not contain documents or portions of documents that are unnecessary for proper consideration of the issues raised on appeal. (Rule 8.124(b)(2).)

In addition to being over-inclusive, the record is under-inclusive. The appendix must include the order appealed from and “any notice of its entry” (rules 8.122(b)(1)(C) & 8.124(b)(1)(A)) and “[a]ny notice of intention to move for . . . reconsideration of an appealed order, with supporting and opposing memoranda and attachments” (rules 8.122(b)(1)(D) & 8.124(b)(1)(A)), showing the dates necessary to determine the timeliness of the appeal (rules 8.122(b)(1)(D) & 8.124(b)(1)(A)). As noted previously, the record does not contain copies of the notices of entry of judgment or proofs of service that were relevant to the question of the timeliness of the appeal from the March 2007

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<sup>10</sup> This material includes cover letters from the county Department of Child Support Services (DCSS), a DCSS audit summary, a vocational evaluation report by Cheryl Foden dated April 6, 2005, a copy of a cashier’s check and a receipt for a \$40,000 payment made by Husband, a marital standard of living analysis by Rundquist and Associates, and a spreadsheet summarizing support payments made by Husband from September 2003 through June 2009. None of this material is endorsed filed or bears an exhibit stamp or any other indication that it was filed with the court.

order. It appears from the briefs that the parties do not understand the importance of such documents.

In addition, the record lacks the transcripts of the evidentiary portion of the April 2009 hearings, the impact of which we will discuss further in the sections that follow.

Although we may impose monetary or other sanctions for filing an appendix that contains inaccurate copies or otherwise violates rule 8.124 (rule 8.124(g)), we elect not to impose sanctions at this time. However, we impress upon the parties and their counsel the importance of proper record preparation and admonish them to familiarize themselves with the rules governing record preparation prior to any future appeals. (See e.g. rules 8.122, 8.124, and Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (the Rutter Group 2009) ¶¶ 4:1-4:55 and 4:121-4:224, pp. 4-1 to 4-14 and 4-33 to 4-50.)

### ***III. June 2009 Attorney Fees Order***

Husband challenges the sufficiency of the evidence to support the June 2009 award of \$15,000 in attorney fees. He contends that there was insufficient evidence that Wife had incurred \$15,000 in fees or that he (Husband) had the ability to pay the fees.

#### **A. Standard of Review**

“[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. [Citations.] ‘[T]he trial court’s order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.’ ” (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.) Although trial courts enjoy broad discretion in awarding attorney fees in marital proceedings, “[t]he exercise of that discretion is guided by statute. As relevant here, the statute permits an award of attorneys’ fees and costs where ‘just and reasonable under the relative circumstances of the respective

parties.’ (§ 2032, subd. (a).) ‘In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party’s case adequately . . . .’ (§ 2032, subd. (b).) ‘A *disparity* in the parties’ respective circumstances may itself demonstrate relative “need” even though the applicant spouse admittedly has the funds to pay his or her fees.’ ” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 314-315 (*Cheriton*), fn. omitted.)

### **B. Adequacy of Record to Review Attorney Fees Issue**

Our ability to review this issue is impaired because Husband has not provided us with a reporter’s transcript of the first two days of the long cause hearing that took place in April 2009, at which time the parties presumably presented evidence on the issues before the court, including Wife’s attorney fees claim. Moreover, the appendices do not include all of the papers the parties filed with the court addressing the issues presented at the hearing. For example, the online register of actions in the court’s website, of which we take judicial notice (Evid. Code, § 452, subd. (d)), indicates that both parties filed trial briefs.

One of the fundamental rules of appellate review is that an appealed judgment or order is presumed to be correct. “All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant (Husband) has the burden of overcoming the presumption of correctness. For this purpose, he must provide this court with an adequate record demonstrating the alleged error. Failure to provide an adequate record on an issue requires that the issue be resolved against him. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

### **C. Analysis**

Even though we do not have a record of the evidentiary portion of the long-cause hearing, there is sufficient evidence in the record to support the amount of the attorney fees awarded (\$15,000). A few days before the hearing, Wife filed an income and expense declaration in which she declared, under penalty of perjury, that she had paid \$134,591.79 in attorney fees and costs and still owed her attorney \$17,979.98. She used credit cards and the proceeds from the sale of the house she had owned with Husband to pay her attorney fees. Wife's attorney told the court that Wife had incurred another \$7,000 in fees for the attorney to attend the first two days of the three-day hearing (two days times 10 hours per day times \$350 per hour = \$7,000). This figure did not include the time for the third day of the hearing, preparation time, or other work the attorney did after the court imposed the previous attorney fees sanction. In our view, this evidence was more than sufficient to support the amount of attorney fees awarded. We note also that while Husband challenges the \$15,000 in fees award to Wife, he admits in his opening brief that he "actually spent \$13,000.00 plus in legal fees for [the April 2009] hearing[s] alone." His April 2009 income and expense declaration supports that assertion.

Husband also contends there was insufficient evidence that he had the ability to pay attorney fees. Husband's failure to provide us with a record of the evidence presented on this issue requires that it be resolved against him.

Nonetheless, the evidence that is in the record leads to the conclusion that the court did not abuse its discretion in finding that Husband had the ability to pay the fee award. In his April 2009 income and expense declaration, Husband declared income of \$10,000 per month starting in October 2008. Prior to that, he earned \$11,250 per month. Husband also declared that he had \$150,000 in assets and that he had earned \$6,700 in March 2009 doing contract work, which the court found was "unlikely to reoccur." As

noted before, Wife argued that Husband was also eligible for commissions and bonuses on his new job. Wife, on the other hand, declared income of \$1,200 per month. Throughout the pendency of the action she earned significantly less than Husband. On this record, we cannot say the court abused its discretion when it impliedly found that Husband had the ability to pay the \$15,000 fee award.

#### ***IV. Permanent Spousal Support Order***

Husband challenges the court's spousal support order on several grounds. He contends that the court did not consider the factors in section 4320. He contends that the court did not consider his ability to pay \$1,500 per month in spousal support, the ability of the parties to pay or maintain their standard of living, or Wife's mutual obligation to support Husband. He contends that the court's order left him with little or no money to pay his own living expenses. He argues that the court erred when it refused to impute income to Wife based on her refusal to work full time in meaningful employment. He argues that Wife has known since May 2005 that she had to seek meaningful employment and that she has made no efforts to seek meaningful full-time employment or become self-supporting. He contends that the court erred by not considering the effect of spousal support on child support.

#### **A. Governing Legal Principles**

"Spousal support is governed by statute. (See §§ 4300-4360.) In ordering spousal support, the trial court *must* consider and weigh all of the circumstances enumerated in the statute, to the extent they are relevant to the case before it. [Citations.] The first of the enumerated circumstances, the marital standard of living, is relevant as a reference point against which the other statutory factors are to be weighed." (*Cheriton, supra*, 92 Cal.App.4th at pp. 302-303, fn. omitted.)

The statutory scheme requires the court to review 14 factors enumerated in section 4320. They include: “(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following: [¶] (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment. [¶] (2) The extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties. [¶] (b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party. [¶] (c) The ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity, earned and unearned income, assets, and standard of living. [¶] (d) The needs of each party based on the standard of living established during the marriage. [¶] (e) The obligations and assets, including the separate property, of each party. [¶] (f) The duration of the marriage. [¶] (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party. [¶] (h) The age and health of the parties. [¶] (i) Documented evidence of any history of domestic violence, . . . . [¶] (j) The immediate and specific tax consequences to each party. [¶] (k) The balance of the hardships to each party. [¶] (l) The goal that the supported party shall be self-supporting within a reasonable period of time. . . . [¶] (m) The criminal conviction of an abusive spouse . . . . [¶] (n) Any other factors the court determines are just and equitable.”

## **B. Standard of Review**

We apply the abuse of discretion standard in assessing Husband's challenges to the award of spousal support. " 'In awarding spousal support, the court must consider the mandatory guidelines of section 4320. Once the court does so, the ultimate decision as to amount and duration of spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of that discretion.' " (*Cheriton, supra*, 92 Cal.App.4th at p. 283, citing *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93 (*Kerr*).)

"In making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of accomplishing substantial justice for the parties in the case before it." (*Kerr, supra*, 77 Cal.App.4th at p. 93.) In balancing the applicable statutory factors, the trial court determines the appropriate weight to accord to each. (*In re Marriage of Baker* (1992) 3 Cal.App.4th 491, 498.) "Furthermore, the court does not have discretion to ignore any relevant circumstance enumerated in the statute. To the contrary, the trial judge must both recognize and *apply* each applicable statutory factor in setting spousal support. [Citations.] Failure to do so is reversible error." (*Cheriton, supra*, 92 Cal.App.4th at p. 304.)

## **C. Alleged Failure to Consider Section 4320 Factors**

The record does not support Husband's contention that the court failed to consider the factors enumerated in section 4320. In rendering its decision, the court referred to section 4320 and each of the subparagraphs in that section and made specific findings with regard to each subparagraph. There is simply no merit to this contention.

#### **D. Alleged Failure to Consider Husband's Ability to Pay Spousal Support**

Husband argues that the court failed to consider his ability to pay \$1,500 per month in spousal support and that the court's order left him with little or no money to pay his own expenses.

Under the section 4320, "a key factor is the supporting party's 'ability to pay,' which encompasses assets as well as income." (*Cheriton, supra*, 92 Cal.App.4th at p. 304, citing § 4320, subd. (c).) "Thus, it is 'proper for the court to look to assets controlled by husband, other than income, as a basis for the award . . . .'" (*Cheriton*, at p. 305.)

The court specifically stated that it considered this factor and made the following comments: "[T]his is a real tough factor for the court. [¶] On the one hand, I don't think that the number suggested by [Husband] is reasonable in light of the needs of [Wife]. [¶] As to earning capacity, I have credited [Husband's] testimony that in his current job his base pay is \$10,000 per month. I do note that he's eligible for commission and for bonuses. I also credited [his] testimony that the \$6,700 event was a contract work and is unlikely to reoccur. [¶] . . . [¶] The thing that troubles me about the representation made by [Husband] relative to his income is he's got monthly expenses of nearly \$19,000." Husband's counsel interrupted and attempted to explain, but Wife's counsel objected to reopening argument and Husband's counsel did not comment further.

In his income and expense declaration from April 2009, Husband declared that he had expenses of \$18,799 per month. Husband attributed \$13,081 of that monthly amount to installment debt.<sup>11</sup> However, there are mathematical errors in the calculation of his installment debt.

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<sup>11</sup> Husband's monthly expenses included \$3,503 for his mortgage, \$600 for property taxes, and \$1,615 for expenses other than installment payments on debt. These items total \$5,718.

The income and expense declaration form contains a section (§ 14) for the parties to list “installment payments and debts.” The form requires the parties to set forth the “amount” of the monthly payment, the “balance” remaining on the debt, and the “date of last payment.” Husband declared that he owed DCSS for child support and spousal support arrearages: a balance of \$6,611 for child support, payable at \$81 per month, and \$45,935 for spousal support. Husband did not declare a monthly payment amount for the spousal support arrearages, because none had yet been ordered by the court. These figures conformed to the court’s order of October 9, 2008.

But the court issued a subsequent order on December 18, 2008, in which it noted that Husband had paid \$5,168.72 toward the previous arrearage on child support, reducing the amount owed through December 31, 2007, to \$1,442.28. The court “estimated” that child support arrearages were \$62,235<sup>12</sup> and ordered payments of \$247 per month beginning December 1, 2008. According to the December 18, 2008 order, the child support indebtedness figures on Husband’s April 2009 income and expense declaration are incorrect. The child support debt of \$6,611 had been reduced to \$1,442.28 and the monthly payment had changed to \$247.

Husband also declared that he had paid \$13,000 in attorney fees and that he borrowed the money to pay those fees from two private individuals, \$3,000 from one person and \$10,000 from another. Husband did not declare a monthly payment amount on either of those debts and erroneously listed the total balance owed in the monthly payments column, rather than the balance due column, thereby significantly inflating his monthly expenses. The \$13,000 owed on the attorney fees loans is the total debt, not the monthly payment amount, and should not have been included as a monthly expense on

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<sup>12</sup> Since Husband was ordered to pay child support of \$1,819 per month beginning in January 2008, the increase in arrearages from \$1,442.28 to \$62,235 in one year appears suspect. However, the latter number is only an estimated amount and the court continued the case for a settlement conference and trial setting on the arrearage issue to May 2009. That issue is not before us on appeal.

Husband's income and expense declaration. Nonetheless, the court accepted the amount listed on Husband's declaration (\$18,799) and found that he had monthly expenses of "nearly \$19,000."

In spite of the disparity it perceived between Husband's income and expenses, the court, after examining all of the section 4320 factors, found that he had the ability to pay \$1,500 in spousal support. If we deduct the \$13,000 that Husband erroneously included in his expense calculation, his expenses are in the range of \$6,000, per month. We perceive no prejudice to Husband as a result of the court's erroneous finding that he had "nearly \$19,000" in monthly expenses.

Husband does not acknowledge this calculation error on appeal, arguing that he "is in the very same factual setting as shown in [*In re*] *Marriage of Mosley* [(2008) 165 Cal.App.4th 1375 (*Mosley*)] having income of \$10,000 vs [*sic*] expenses of \$19,000." The appellate court in *Mosley* held that the trial court abused its discretion when it denied the husband's request to modify child support and spousal support on the basis of changed circumstances. The parties in *Mosley* were both lawyers. The husband was a partner in a large law firm, while the wife stayed home and took care of their five children. Support was ordered based on the husband's income of \$441,750 per year with the possibility of a bonus. A few years later, the husband lost his job at the law firm and found another job that paid \$205,000 per year with the possibility of a discretionary bonus. (*Id.* at p. 1379.) The evidence showed that the husband used almost all of his take-home pay to pay his support obligations (approximately \$10,000 per month – *id.* at p. 1381) and that he had to borrow most of the year to pay his living expenses, in the hope that he would earn a year end-bonus that would permit him to repay the debt. The appellate court found that it was an abuse of discretion for the trial court to base the husband's support obligation on the receipt of a bonus that might never materialize and held that the husband should not have to borrow for most of the year. (*Id.* at pp. 1379-1380, 1386-1387.)

This case is factually distinguishable from *Mosley*. Husband did not use nearly all of his take-home pay to pay his support obligations. At the time of trial, his gross income was \$10,000 per month with the possibility of commissions and bonuses. There was evidence that his net, disposable income in 2008 was \$7,034 per month. His child support obligation was \$1,853 per month and there is no evidence that he had to borrow money to meet his living expenses. The only debts he declared were his support arrearages and the loans for his attorney fees. Thus, Husband's reliance on *Mosley* is misplaced.

#### **E. Alleged Failure to Consider Marital Standard of Living**

Husband contends that the court abused its discretion because it did not consider the parties' ability to maintain the marital standard of living. Apparently, there was expert testimony on this issue, however, it is not part of the record on appeal.<sup>13</sup> Nonetheless, the record reflects that the court did consider this factor. The court addressed this factor, using the language of section 4320, and stated, "Subparagraph D, the needs of each party based on the standard of living established during the marriage. As I said earlier, I don't believe that either party, certainly not [Wife], is going to be in a position to meet the standard of living."

Husband argues that the court's finding that neither party is going to be able to meet the marital standard of living required the court to deny the request for spousal support. He cites no legal authority for that proposition.

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<sup>13</sup> In argument, both counsel referred to the testimony of "Mr. Firoozye" and "Ms. Chung" regarding that marital standard of living and net disposable income. Firoozye prepared a report that was placed in evidence, but is not in the record on appeal. Wife's appendix includes a copy of a report authored by "Lucy H. Chung, CPA" in October 2008, which includes an analysis of the marital standard of living and income available for support. However, the record does not disclose whether this report was in evidence. The record does not contain the testimony of either expert.

As stated before, the marital standard of living is relevant “as a reference point against which the other statutory factors are to be weighed.” (*Cheriton, supra*, 92 Cal.App.4th at p. 303.) Section 4320, subdivision (d) requires the court to consider the “needs of each party based on the standard of living established during the marriage.” It does not require a finding that either party has attained the marital standard of living before support is ordered.

Generally speaking, the court should award support and retain jurisdiction if, after weighing the totality of the circumstances, the supported spouse cannot maintain the marital standard of living without assistance from the other spouse who has the ability to pay. (Hogoboom & King, Cal. Practice Guide: Family Law (the Rutter Group 2009) ¶ 6:946, p. 6-346.4, citing *Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 362-363; *Marriage of Smith* (1990) 225 Cal.App.3d 469, 488, fn.9; and *Marriage of Kerr, supra*, 77 Cal.App.4th at p. 94.) That is exactly what the court did here. There was a significant disparity between the parties’ incomes. Wife, who had primary responsibility for raising the children, obtained part-time employment, lived in rented property (\$1,650 per month), had income of \$1,200 per month, used the proceeds of the sale of the house she had owned with Husband and credit cards to pay her attorneys, was “depleting” her savings to meet living expenses in 2007, and using her credit cards to pay her living expenses in 2009. Husband, although he had experienced some periods of unemployment, was working full-time, earning \$10,000 base salary, plus commissions and bonuses in 2009. In 2008, he earned \$11,250 per month. He purchased a new home in 2005. In April 2009, he had assets worth \$150,000. He did not incur credit card debt to pay his living expenses. On these facts, we cannot say that the court abused its discretion when it concluded that that Wife could not maintain or approach the marital standard of living without assistance from Husband.

Husband’s reliance on *In re Marriage of Morrison* (1978) 20 Cal.3d 437, is misplaced. In *Morrison*, the Supreme Court held that “[a] trial court should not terminate

jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction.” (*Id.* at p. 453.) Here the court did not terminate its jurisdiction to order spousal support. In fact, it ordered a further review of the case in April 2010.

#### **F. Failure to Impute Income to Wife**

Husband argues that the court erred when it refused to impute income to Wife based on her alleged refusal to seek meaningful full-time employment or become self-supporting. He argues that Wife has known since 2005 that she needs to seek meaningful employment and that she has made no efforts to do so.

“A trial court may consider earning capacity in determining spousal support, just as it may with child support. [Citations.] Unlike a child support order, however, a spousal support award does not require the court to consider the children’s best interests. (Cf. § 4058, subd. (b).)” (*Cheriton, supra*, 92 Cal.App.4th at p. 308.) Rather, it requires the trial judge to balance the factors listed in section 4320. (*Cheriton*, at p. 308.)

Again, our ability to review this issue is impaired by Husband’s failure to provide an adequate record of the long-cause hearing in April 2009. The parties’ arguments before the trial court indicate that the issue of Wife’s earning capacity and ability to become self-supporting was before the court. However, we do not know what evidence was presented on this issue. The record contains a vocational evaluation from 2005, but it is unclear whether this was before the court. Moreover, a vocational evaluation done in 2005 would have been stale by the time of the April 2009 hearings. Husband’s failure to provide an adequate record requires that this issue be resolved against him. (*Maria P. v. Riles, supra*, 43 Cal.3d at p. 1295.)

Even if we were to consider the issue, based on the record before us, we are not persuaded that the court abused its discretion when it failed to impute income to Wife.

When Husband filed for dissolution of the marriage in 2003, Wife did not work outside the home and had not worked since the birth of their first child in 1996. After Husband filed for divorce, Wife obtained part-time employment at her children's school and at her attorney's office, and by 2009 she was working 30 to 35 hours per week. She retained primary responsibility for the care of the couple's school-aged children. At various times during the pendency of this litigation, both parties were under orders to find employment. In 2005, the vocational evaluator concluded that Wife no longer has the skills to work as a system analyst. Based on this evidence, we conclude that the court did not abuse its discretion when it decided not to impute income to Wife.

#### **G. Failure to Consider Child Support**

Husband also complains that the court did not consider child support payments, without any argument or citation to legal authority. We note that this is not one of the factors under section 4320. “ ‘ “When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary.” ’ ” (*Mosley, supra*, 165 Cal.App.4th at pp. 1392-1393, citing *Estate of Bibb* (2001) 87 Cal.App.4th 461, 470.) This argument is deemed abandoned.

#### **V. Trial Court Bias**

Husband contends that he was “denied a fair and impartial trial judge” at the April 2009 hearings because the judge who heard those proceedings, Judge Derek Woodhouse, was the same judge who found that Husband had “perjured himself on numerous occasions” and who imposed the \$75,000 attorney fees sanction. He contends that Judge Woodhouse should have recused himself under Code of Civil Procedure section 170.1, subdivision (a)(6)(A) and that the judge's “actual impartiality” denied Husband his constitutional right to due process. Wife argues that Husband has forfeited this claim by failing to raise it in the trial court.

“Bias and prejudice are grounds for disqualification of trial judges. ([Code Civ. Proc., ]§ 170.1, subd. (a)(6).) And if judges fail to recuse themselves, there is a statutory procedure to litigate the issue. ([Code Civ. Proc., ]§ 170.3.)” (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1218 (*Moulton*).) The issue of bias is generally a matter of state law and requires recusal on constitutional grounds only in rare instances. (*Caperton v. A.T. Massey Coal Co., Inc.* (2009) \_\_\_ U.S. \_\_\_, \_\_\_ [129 S.Ct. 2252, 2259, 2265-2266] (*Caperton*).)

### **A. Adequacy of Record on Bias Issue**

Wife argues that Husband did not challenge Judge Woodhouse or raise the issue of bias in the trial court. Husband does not respond to or disagree with that assertion in his reply brief. As noted before, the record of the April 2009 proceedings before Judge Woodhouse is incomplete. Assuming arguendo that Husband did challenge Judge Woodhouse, his failure to provide us with an adequate record of the proceedings below to permit review of the issue requires that we resolve this issue against him. (*Maria P. v. Riles, supra*, 43 Cal.3d at p. 1295.)

### **B. Forfeiture**

“[A]n appellate court will ordinarily not consider procedural defects or erroneous rulings where an objection could have been, but was not raised below. [Citation.] The policy behind the rule is fairness. ‘Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider.’ ” (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 826.) A party may forfeit claims of judicial bias by failing to raise them in the trial court. (*Moulton, supra*, 111 Cal.App.4th at p. 1218.)

Nothing in the record suggests that Husband ever raised the issue of judicial bias in the trial court or took advantage of the statutory procedures for challenging Judge

Woodhouse. His failure to do so deprived Wife of the chance to argue the issue and prevented the trial court from making any ruling on the point. Accordingly, we decline to consider the issue now.

### **C. Whether Conduct Complained of Constitutes Bias**

Even if we were to consider the issue, we are not persuaded that the judge's findings and the order that Husband complains of exhibit bias. Husband's claims the judge was biased because he had previously found that Husband had perjured himself and imposed \$75,000 in attorney fees as a sanction for Husband's acts of concealing his income, breaching his fiduciary duty to Wife, misleading the court, and perjuring himself.

Code of Civil Procedure section 170.1, subdivision (a)(6)(A) provides: "(a) A judge shall be disqualified if any one or more of the following is true: [¶] . . . [¶] (6)(A) For any reason: [¶] (i) The judge believes his or her recusal would further the interests of justice. [¶] (ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial. [¶] (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

"When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties." (*Moulton, supra*, 111 Cal.App.4th at p. 1219.) In *Moulton*, the court refused to "hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias." (*Ibid.*) The court explained, "[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. It is [the court's] duty to consider and pass upon the evidence produced before [it], and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing

party. The opinion thus formed, being the result of a judicial hearing, does not amount to [improper] bias and prejudice . . . .’ ” (*Id.* at pp. 1219-1220, citing *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312; accord *In re Focus Media, Inc.* (9th Cir. 2004) 378 F.3d 916 [bankruptcy judge’s adverse ruling against debtor and finding that debtor was uncooperative would not have caused a reasonable person with knowledge of facts to question judge’s impartiality and did not provide basis for judge’s recusal], superseded by statute on another ground as stated in *In re Euro-American Lodging Corp.* (Bankr. S.D.N.Y. 2007) 357 B.R. 700, 712, fn. 8.) Similarly, Judge Woodhouse’s resolution of the issues presented in January 2007 would not have caused a reasonable person with knowledge of facts to question his impartiality and was not grounds for his recusal. Moreover, our review of the partial record of the April 2009 proceedings reveals that the court gave Husband an opportunity to be heard, followed the law, and articulated its reasons for its findings. Nothing here supports Husband’s claim that the court’s decision was the result of a bias against Husband.

Husband’s reliance on *Caperton* is misplaced. As the court explained in *Caperton*, “ ‘most matters relating to judicial disqualification [do] not rise to a constitutional level’ ” and “ ‘matters of kinship, personal bias, state policy, remoteness of interest’ ” are generally matters of legislative discretion, “left to statutes and judicial codes.” (*Caperton, supra*, 129 S.Ct. at p. 2259.) The court described those rare cases in which it had found that the issue of judicial disqualification had reached constitutional dimension, including cases involving (1) local tribunals where the trier of fact has a financial interest in the case, either personal or on behalf of the governmental entity he represented, and (2) criminal contempt proceedings, which should be conducted “ ‘before a judge other than the one reviled by the contemnor.’ ” (*Id.* at p. 2262; *id.* at pp. 2259-2262.) The court concluded that in *Caperton*, in which a person with a \$50 million stake in pending litigation had a significant and disproportionate influence on the case by contributing \$3 million to the election campaign of an appellate justice who would

ultimately decide the case, required the justice to recuse himself on constitutional grounds. Husband's claims are factually distinguishable from *Caperton* and the cases discussed therein and clearly do not rise to the level of those cases that require recusal on constitutional grounds.

#### ***VI. Wife's Sanctions Request***

In her brief, Wife states that she will be filing a motion to recover her costs and attorney fees on appeal as a sanction for an appeal that was frivolous or taken solely for delay. However, she has not filed such a motion. We shall not address this issue further since Wife failed to raise it by separate motion in this court as required by the rules governing appellate motion procedures. (Rule 8.276(a); see *Kajima Engineering & Const., Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.)

#### **DISPOSITION**

Husband's appeal of the March 2007 attorney fees order is dismissed.

The June 2009 spousal support/attorney fees order is affirmed. Both parties are to bear their own costs on appeal.

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McAdams, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Duffy, J.